(2)

NO. 89-244

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1989

ANTHONY PELLEGRINI,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

JAMES M. SHANNON
ATTORNEY GENERAL

MICHAEL W. DINGLE
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2838

Of Counsel: Paula J. DeGiacomo
Assistant Attorney General
Chief, Appellate Division

20 pp

NO. 89-244

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1989

ANTHONY PELLEGRINI,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

JAMES M. SHANNON
ATTORNEY GENERAL

MICHAEL W. DINGLE
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2838

Of Counsel: Paula J. DeGiacomo
Assistant Attorney General
Chief, Appellate Division

QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence seized pursuant to a warrant which the judge intended to issue but inadvertently failed to sign?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Miscellaneous

NO. 89-244

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1989

ANTHONY PELLEGRINI,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

Respondent is satisfied with petitioner's citation to the opinion below.

STATEMENT OF THE CASE

Respondent relies on the facts set forth in Commonwealth v. Pellegrini, 405 Mass. 86, 539 N.E.2d 514 (1989).

REASONS FOR DENYING THE WRIT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Matter Is Controlled By Prior Decisions Of This Court.

Petitioner claims that the judge's inadvertent failure to sign the search warrant rendered the warrant a nullity and that therefore the search was a warrantless one in violation of the Fourth Amendment of the United States Constitution. Petitioner, however, does

not dispute that the affidavits in support of the search warrant established probable cause and were reviewed and signed by the judge, attesting that the officer swore the truth of their contents before the judge. Further, petitioner does not dispute that the judge intended to issue the warrant, telling the police officer he had "a good warrant." Nor does petitioner contend that there were any defects in the warrant as to the particularity of items and the place to be searched or in the execution of the warrant. Finally, it is uncontested that before the search the police officer told the defendant the name of the issuing judge when the defendant called to his attention the fact that the warrant was not signed. Commonwealth v. Pellegrini, 405 Mass. 86 at 86-88, 539 N.E.2d 514 (1989).

There is no substantial question presented because previous decisions of this Court, United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), are dispositive of petitioner's claim.

In Leon and Sheppard, this Court held that even if an error of constitutional dimensions may have been committed with respect to the issuance of search warrants,[1/] where a neutral and detached magistrate, not the police officers, made the mistake, the evidence will not be suppressed if the police officers acted in objectively reasonable reliance on the warrant. Sheppard, 468 U.S. at 987-988, 990 (1984); Leon, 468 U.S. 897 (1984). In Sheppard, a detective investigating a murder

---

1/ Here, the error did not rise to the level of a violation of state or federal constitutional law. See infra.

case prepared and presented to the judge an affidavit for the search of the defendant's house as well as a "form warrant" for controlled substances which the detective had attempted to alter to conform to the affidavit. Sheppard, 468 U.S. at 985-986. In his review of the warrant, the judge failed to change the substantive portion on the "form warrant" which authorized a search for controlled substances only. He also failed to alter the form so that it incorporated the affidavit. Id. The judge signed the warrant, gave it to the detective, and informed him that the warrant was sufficient authority in form and content to carry out the search requested. Id. at 986. The search was executed in conformity with the description of the items sought in the affidavit. Id. The judge's error was not in concluding that the warrant should issue, but in failing

to make the necessary changes on the form. Id. at 990 n.7. This Court held that the officers had a reasonable basis for believing that the search was authorized by a valid warrant as they had taken "every step that could reasonably be expected of them." Id. at 989. What was said in Sheppard applies with equal force in the instant case:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring in judgment). Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case.

Id. at 990-991. See also Leon, 468 U.S. at 921-922. (It is the magistrate's responsibility to determine probable cause and, if he so finds, "to issue a warrant comporting in form with the requirements of the Fourth Amendment"; an "officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient"). (emphasis added) Petitioner claims that Leon and Sheppard do not control this case. It is true that in Leon, the court stated the general proposition that, "depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be

valid. Cf. Massachusetts v. Sheppard, post, at 988-991." Leon, 468 U.S. at 923. However, as is clear, the Court is explicit in distinguishing the circumstances in Sheppard from this general proposition. In fact, a virtually identical claim of "facial deficiency" was made and summarily rejected in Sheppard:

> [T]hat argument is based on the premise that O'Malley had a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made . . . . [W]e refuse to hold that an officer is required to disbelieve a judge who has just advised him, by word and action, that the warrant he possesses authorizes him to conduct the search he has requested.

Sheppard, 468 U.S. at 989-990.

If the facial defects on the warrant in Sheppard did not preclude an officer from reasonably presuming the warrant valid, then a fortiori the inadvertent failure of the judge to sign the warrant

where he intended to issue the warrant, had signed the affidavits, properly determined there was probable cause, and told the officer he had a good warrant, should not.

B. The Inadvertent Failure Of The Judge To Sign The Search Warrant Is Not An Error Of Federal Constitutional Dimension.

As succintly stated by the Supreme Judicial Court in its opinion below:

> The Fourth Amendment to the United States Constitution requires that "no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the things to be seized." The defendant does not dispute that the judge intended to issue the warrant, that there was probable cause to support the warrant, and that the warrant described the place to be searched and the items to be seized with sufficient particularity. There is no Federal requirement either under the Fourth Amendment or case law from the United States Supreme Court which requires that a judge sign the actual warrant. Where, as here, the judge's name as the official who took the affiant's oath appears on the affidavit on which the warrant is based, where the judge said to the officer, "[You have] a

> good warrant," and where all the other Federal requirements are met, we think the warrant is valid as a matter of Federal law. "As long as the [judge] in fact performs the substantive tasks of determining probable cause and authorizing the issuance of the warrant, the [Fourth A]mendment is satisfied." United States v. Turner, supra at 50.

Commonwealth v. Pellegrini, 405 Mass. at 89-90.

This is consistent with what is implicit in Leon and Sheppard, viz., that the essential element in the issuance of a warrant is the determination of probable cause by a neutral and detached magistrate, not the judge's signature or the form of the warrant. This actual determination of probable cause is the "reliable safeguard" for assuring compliance with the Fourth Amendment. Leon, 468 U.S. at 913.

The cases relied on by petitioner in his attempt to demonstrate a conflict in federal constitutional law between the

decision below and the decisions of other state appellate courts do not in fact rest on federal constitutional grounds. Three of the cases rely on a strict construction of the particular state constitution, state statutes or state rules of criminal procedure as to whether a requirement that a warrant "issue" means that the warrant must be signed. See, State v. Surowiecki, 184 Conn. 95, 440 A.2d 798, 799-800 (1981) (the word "issue" in the state statute held to require magistrate's signature as a matter of statutory construction; no claim or reliance upon state or federal constitutional provisions); State v. Spaw, 18 Ohio App. 3d 77, 480 N.E.2d 1138, 1140-1141 (1984) (state rule of criminal procedure requiring warrant to "issue" held to require signature of either judge or clerk as a matter of state statutory construction). One of

the cases cited by petitioner, People v. Hentkowski, 154 Mich. App. 171, 397 N.W.2d 255, 258 n.1 (1986) (the word "issue" in the state constitution construed to mean warrant must be signed as a matter of state constitutional law), has, arguably, been undermined by the Michigan Supreme Court in People v. Mitchell, 428 Mich. 364, 408 N.W.2d 798, 800-801 (1987) (although as a matter of state constitutional law a search warrant based on an unsigned affidavit will be presumed to be invalid, the presumption may be rebutted by a showing that the facts in the affidavit were presented under oath to the magistrate). The only other case cited by petitioner, Byrd v. Commonwealth, 261 S.W.2d 437, 438 (Ky. 1953), is wholly inapposite to this case. There, the court held that a judge's delegation of his authority to a private individual, his secretary, to

sign the judge's name to a warrant was precluded by the state constitution and the Fourth Amendment.

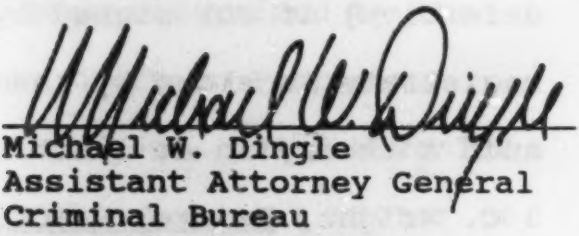
Finally, the lack of substantiality of petitioner's claim that a "warrant" is not a "warrant" (and is constitutionally defective) if not signed by the issuing magistrate is shown by the rejection of such a theory in at least two treatises, 3 C. Wright, Federal Practice & Procedure §670.1 (2d ed. 1982); W. LaFave, Search and Seizure §4.3(c) pp. 174-177 (1987). These treatises also note that oral warrants are authorized by Fed. R. Crim. P. 41(c)(2) which allows a magistrate, if satisfied oral testimony is sufficient to find probable cause, to order the issuance of the warrant by directing the person requesting the warrant to sign the magistrate's name on the duplicate original warrant.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES M. SHANNON
Attorney General



Michael W. Dingle
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2838

Of Counsel:
Paula J. DeGiacomo
Assistant Attorney General
Chief, Appellate Division